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Nos. 00-1751, 00-1777 & 00-1779

IN THE

Supreme Court of the United States

SUSAN TAVE ZELMAN, SUPERINTENDENT OF OHIO, ET AL., *Petitioners*

v.

DORIS SIMMONS-HARRIS, ET AL., *Respondents*

HANNA PERKINS SCHOOL, ET AL., *Petitioners*

v.

DORIS SIMMONS-HARRIS, ET AL., *Respondents*

SENEL TAYLOR, ET AL., *Petitioners*

v.

DORIS SIMMONS-HARRIS, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR NEW MEXICO GOVERNOR GARY E. JOHNSON AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Gary E. Johnson, as Governor of the State of New Mexico, submits this brief *amicus curiae* in support of Petitioners.[1] Since his election in 1994, and continuing since his re-election in 1998, Governor Johnson has made school reform the highest priority of his administration. Governor Johnson has implemented measures that have dramatically increased funding for operations and capital projects for New Mexico's public schools, increased teacher salaries, and brought new accountability to the public school system. Despite these reforms, the performance of New Mexico's public schools remains unacceptable. A clear majority of children continue to be unable to achieve grade-level competency in reading, math, and other basic subjects, and a scandalously high proportion -- over one-third -- of public schools received the lowest possible rating ("probationary") from the state Department of Education.

Seeking success where traditional reforms have failed, Governor Johnson has submitted school choice proposals in each of the last three legislative sessions. His 2001 bill would have provided a voucher worth close to 80 percent of public school per-pupil unit value from New Mexico's general fund revenues to all children for use at a school of their choice, whether religious or non-religious. *See* House Bill 84, 45th N.M. Legis., 1st Regular Sess. (2001). Although Governor Johnson has fought for the passage of these school choice initiatives, none has been enacted. In the coming months, Governor Johnson will propose a new universal choice initiative and once again will make its enactment one of his highest priorities.

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[1] All Petitioners and Respondents have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution to the preparation or submission of this brief.

Governor Johnson believes that school choice represents the best hope for achieving real improvements in the education of New Mexico's children. School choice would be a win-win proposition -- children currently trapped in failing public schools could use a voucher to escape to a better school, while the healthy incentives of competition would spark improvements in the public schools themselves. Moreover, for the reasons set forth below and in Petitioners' briefs, Governor Johnson believes that the Establishment Clause of the First Amendment poses no bar to the inclusion of religious schools in a choice program such as the Cleveland Pilot Scholarship Program.

SUMMARY OF ARGUMENT

In the 1990s, the Cleveland public schools had descended into collapse. Ohio responded with a bold and innovative measure known as the Pilot Scholarship Program. By supplying a voucher that low-income parents could use to pay tuition at a private school, whether religious or not (or at a public school in a neighboring district, had any chosen to participate), Ohio enabled many disadvantaged children to escape Cleveland's failed schools. At the same time as it provided an immediate lifeline to these students, Ohio sought to lay the groundwork for durable and significant improvements in the Cleveland public schools themselves, by replacing the "quiet life" of monopoly with the healthy incentives of competition. By empowering parents to choose private schools if the public schools fail to fulfill their obligations, Ohio has taken a long-overdue step toward reforming "the communist economy" that even the former president of the American Federation of Teachers recognizes prevails in public education today. *See infra* at 7-8.

To strike down the Scholarship Program, the Sixth Circuit majority committed multiple errors. The court relied nearly exclusively on the percentage of parents that chose to use their vouchers at religious schools, contrary to *Mueller v.*

Allen, 463 U.S. 388 (1983). The court willfully blinded itself to the Scholarship Program's history and context, contrary to this Court's "endorsement" jurisprudence, and ignored in particular the innocuous reasons why a high percentage of parents chose religious schools. And the court impugned Ohio's motives, without a shred of evidence and contrary to this Court's precedents demanding respect -- not suspicion -- of States' assertions of their legislative purposes.

The court was wrong to convict Ohio of hatching a covert plot to promote religion behind a mask of sham facial neutrality. Ohio has provided families with genuine choices -- not "illusory" or "alleged" choices, *see* 234 F.3d at 959 -- between religious schools, private non-religious schools, community schools, and traditional public schools, and all monies that flow to religious schools under the Scholarship Program do so only as a result of such genuine and private choices. This case is nothing like *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). Ohio is no serial Establishment Clause violator, and there is no evidence that the Scholarship Program's neutrality is just an empty wink and a nod. This Court should hold that the "primary effect" of the Scholarship Program is the plainly secular and critically important effect of improving the education of Cleveland's children, and should reject the Sixth Circuit's baseless attack on Ohio's legislative motives.

ARGUMENT

I. FAILING PUBLIC SCHOOLS ARE AMONG THE MOST SERIOUS PROBLEMS FACING THE STATES

The several States, and their governors as chief executives, *see, e.g.*, N.M. Const. art. V, § 4, bear responsibility for ensuring that a quality education is available to all children. *See, e.g.*, Fla. Const. art. IX, § 1

(declaring that it is "a paramount duty of the State to make adequate provision for the education of all children residing within its borders"). In particular, the Ohio Constitution has been held to impose such a duty upon the State. *See DeRolph v. State*, 89 Ohio St.3d 1, 10, 728 N.E.2d 993, 1001 (2000) (holding that Ohio Const. art. VI, § 2 requires legislative provision for a system sufficient for "all students to be afforded an educational opportunity").

The importance of fulfilling this duty to provide for quality education for all children has only increased since this Court observed a half-century ago that "education is perhaps the most important function of state and local governments." *Brown v. Board of Ed. of Topeka*, 347 U.S. 483, 493 (1954). As the Court emphasized, education "is the very foundation of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Id.* In *Mueller*, this Court similarly recognized that "[a]n educated populace is essential to the political and economic health of any community." 463 U.S. at 395. It would be impossible to overstate the importance of education to social and economic progress.

Moreover, this Court has recognized that the responsibility to provide quality education lies uniquely with the States. *Cf. United States v. Lopez*, 514 U.S. 549, 564 (1995) (observing that "education" is an "area[ ] . . . where States historically have been sovereign"); *id.* at 580 (Kennedy, J., joined by O'Connor, J., concurring) ("it is well established that education is a traditional concern of the States") (citing, *inter alia*, *Milliken v. Bradley*, 418 U.S. 717, 742-142 (1974). This Court also has recognized the wisdom of our federal system's allocation of education to the province of state and local governments, observing that "[p]luralism" in education encourages "experimentation, innovation, and a healthy competition for education excellence." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411

U.S. 1, 50 (1973) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

Against a background of abject failure necessitating judicial supervision of the Cleveland school system, *see Reed v. Rhodes*, 934 F. Supp. 1459, 1460-61 & n.1 (N.D. Ohio 1996) (detailing "the documented administrative and fiscal mismanagement of the Cleveland School District"), Ohio acted in the best experimental traditional of our federalism when it enacted the Scholarship Program. *See San Antonio Indep. Sch. Dist.*, 411 U.S. at 50 ("No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education."). In this domain of traditional State authority, the federal courts must take special care to respect "the happy incident[ ] of the federal system" that permits a State to "try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting).

In New Mexico and across the Nation, States have been striving to deliver on the promise of a quality education for all. Unfortunately, but undeniably, serious problems remain. In particular, although States have increased the amount of money spent on education, additional spending has not produced improved results. To the contrary, Caroline Hoxby has calculated that "average public school productivity was about 65 percent higher in 1970-71 than in 1998-99."[2] In fact, the "measured productivity of school inputs is so low, even by the most optimistic estimates," that most studies "have focused on the question of whether there is *any* relationship at all" between inputs such as per-pupil spending and student achievement. Caroline M. Hoxby,

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[2] Caroline M. Hoxby, *School Choice and School Productivity (or, Could School Choice Be a Tide that Lifts All Boats?)* 2, in Caroline M. Hoxby, ed., THE ECONOMIC ANALYSIS OF SCHOOL CHOICE (forthcoming, Univ. of Chicago 2001), *available at* http://www.nber.org/books/schools.

Introduction 7, in Hoxby, THE ECONOMIC ANALYSIS OF SCHOOL CHOICE, *supra* note 2.

State budget increases have proved powerless to turn around New Mexico's highly troubled education system. New Mexico more than doubled per-pupil spending during the 1990s. Yet less than half of children in grades three through nine achieved grade-level competency in basic subjects in 2000, and nearly half of the State's public schools were rated as "probationary" (the lowest rating possible). In Albuquerque, which contains the largest school district in the State, more than a third of high school students drop out over four years. Even as school spending has shot up, it has been outpaced by school violence and vandalism, which increased 232 percent between 1991 and 1999.

Cleveland's public-education crisis is a powerful testament to the futility of throwing money at the failings of our public schools. In the early 1990s, the Cleveland public school district amassed $140 million in debt and could not account for $40 million advanced by the State. *See Reed*, 934 F. Supp. at 1460, 1464. These "soaring expenditures" were matched only by soaring absentee, dropout, and non-promotion rates. *See id.* at 1460 n.1 (citations omitted). Plainly, the solution to the district's problems could not be merely financial.

Faced with the demonstrated failure of traditional reform efforts and a deepening crisis, many governors, mayors, and other elected officials have concluded that a fundamentally different approach is needed. The crisis in public education cannot be fixed by spending more money or by any of the incremental reforms (such as reducing class size) that governments have attempted to impose on the system from the top down. Governor Johnson, along with numerous others, believes that school choice holds the greatest hope of succeeding where past efforts have failed.

II. SCHOOL CHOICE HOLDS GREAT PROMISE BECAUSE IT WILL ALLOW COMPETITION TO PERFORM THE SAME FUNCTION IN EDUCATION AS IN THE ECONOMY AS A WHOLE

This Nation has long trusted competition to deliver better and cheaper goods and services in nearly every sector of our economy. This Court has described the federal antitrust laws as "the Magna Carta of the free enterprise system," because they ensure that competition remains robust. *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). "The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. The heart of our national economic policy long has been faith in the value of competition." *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978) (quotation omitted).

Concomitantly, the Nation has long understood that the absence of competition fosters inefficiency, unresponsiveness, and a lack of innovation. *See United States v. Grinnell Corp.*, 236 F. Supp. 244, 258 (D.R.I. 1964) (describing "the danger of a business becoming slothful, routinized, sleepy, or wanting in alertness, initiative, and progressiveness, as a result of the quiet life sought and usually achieved by a monopolist"), *aff'd in part and rev'd in part on other grounds*, 384 U.S. 563 (1966). Yet one of the largest and most critical sectors of the economy remains hobbled by a system of monopoly. No less an authority on this subject than the former president of the American Federation of Teachers recognizes this anomaly:

> It's time to admit that public education operates like a planned economy, a bureaucratic system in which everybody's role is spelled out in advance, and there are few incentives for innovation and productivity.

> It's no surprise that our school system doesn't improve: It more resembles the communist economy than our own market economy.

Reding, Wrighting & Erithmatic, Wall St. J., Oct. 2, 1989.

The need to remedy this anomaly is overdue. Ending "the quiet life" in the critical sector of education can produce fundamental changes in the public education system. By empowering families rather than bureaucrats and imposing the same discipline that works so well in the rest of our economy -- provide a service that people value at a fair price, or lose their business -- school choice can refashion the incentive structure of the public education system.

For these reasons, choice is an invaluable weapon in the States' struggle to provide a quality education for all children. It is critical to emphasize in this regard that school choice does not improve the lot of the children that escape failing public schools *at the expense* of those that remain in public schools. To the contrary, and unlike the traditional reform efforts that have failed to achieve real progress, choice provides an organic incentive to continuous improvement in the entire sector. Choice thus is not a scheme to eliminate public education, but a means to improve public education. The healthy incentive to compete functions as "a tide that lifts all boats."[3]

The "rising tide" effect of choice not only is consistent with what we know about the effects of competition in other sectors of the economy. It is also well-documented, even with the limited experience that the few existing school choice programs have provided thus far. Professor Hoxby's study of choice in Milwaukee, Michigan, and Arizona concluded that "[i]n each case . . . regular public schools boosted their productivity when exposed to competition. In

[3] Hoxby, *School Choice and School Productivity (or, Could School Choice Be a Tide that Lifts All Boats?)*, in Hoxby, ECONOMIC ANALYSIS OF SCHOOL CHOICE, *supra* note 2.

fact, the regular public schools responded to competitive threats that were, if anything, surprisingly small." *Id.* at 54. Moreover, "[i]n each case, the regular public schools increased the growth rates of their productivity by raising achievement, not by lowering spending while maintaining achievement." *Id.* Another evaluation of Arizona's charter school program similarly concluded that "significant responses have already occurred in just the first three years of competition. Further, often these responses are found in the lower performing districts, which probably are in most need of change."[4]

Jay Greene's study of Florida's school choice program found remarkable evidence that public schools responded to competition when they faced the prospect of losing some of their students to private schools. "The results show that schools receiving a failing grade from the state in 1999 and whose students would have been offered tuition vouchers if they failed a second time achieved test score gains more than twice as large as those achieved by other schools."[5]

There is also unmistakable anecdotal evidence of public schools reforming themselves in response to competition. A review of Florida public schools' own statements confirmed the Greene study's findings. "As the schools themselves state in various documents obtained through public records requests, the mere threat of losing students through the Opportunity Scholarship program and the other school choice options of the Florida A+ Plan has led districts with

[4] Frederick Hess, Robert Maranto & Scott Milliman, *Coping with Competition: How School Systems Respond to School Choice* 29 (Program on Education Policy and Governance research paper 1998), *available at* http://www.ksg.harvard.edu/pepg/papers.htm.

[5] Jay P. Greene, *An Evaluation of the Florida A-Plus Accountability and School Choice Program* ii (Florida State Univ. 2001), *available at* http://www.ksg.harvard.edu/pepg/papers.htm.

schools that have received one 'F' to launch major reform efforts."[6] Even a privately-funded voucher program limited to a single failing elementary school in Albany, New York had a similar effect. The "exodus" of voucher recipients "sent a much-needed wake-up call to Albany public school officials who immediately took steps to reform Giffen Elementary."[7]

The evidence from Milwaukee is particularly striking. After the Wisconsin Supreme Court upheld the Milwaukee voucher program, *see Jackson v. Benson*, 218 Wis.2d 835, 578 N.W.2d 602 (1998), Milwaukee public schools ("MPS") superintendent Alan Brown "issued a bona fide guarantee to public school students: learn to read on grade level by the end of second grade or the district will pay for individualized help. Brown's guarantee was one of the strongest signs to date that [MPS] may be stepping up to make its schools more competitive in the growing educational marketplace." Joe Williams, *MPS Guarantees Help for Poor Readers*, Milw. J. Sentinel, Dec. 23, 1998, at 1. A state legislator enthused that "[t]his was our goal when we offered Milwaukee options like school choice and charter schools." *Id.* A later article catalogued the "big steps" taken to change "the fundamental realities" of MPS in order to make MPS "more popular with parents." Alan J. Borsuk, *MPS Establishment Taking Korte's Cue for Sweeping Change*, Milw. J. Sentinel, Nov. 28, 2000, at 1A. More recently, the *Journal Sentinel* observed that "[m]uch of what the system is doing to improve gained impetus because of the expansion of choice in Milwaukee," and thus that "competition for students can

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[6] Carol Innerst, *Competing to Win: How Florida's A+ Plan Has Triggered Public School Reform* 5 (Urban League of Greater Miami 2000), *available at* http://edreform.com/school_choice/compete.htm.

[7] Nina Shokraii Rees, *Public School Benefits of Private School Vouchers*, 93 Policy Rev. (Jan./Feb. 1999), *available at* http://www.policyreview.org/jan99/rees.html.

lead to ferment that benefits schoolchildren." *MPS and Virtues of Choice*, Milw. J. Sentinel, Jan. 31, 2001, at 10A.

None of this should be surprising. School choice removes public schools' freedom to fail with impunity. Under Florida's A+ Plan, for example, public school officials understand that failure has consequences: "Schools reconstituted, State intervention, Opportunity scholarship, Loss of students and [full-time equivalent funding]." Innerst, *supra* note 6, at 9. Florida's choice program directs the public schools to improve their performance, and supplies a powerful answer to the question posed by the Broward County school board: "What will happen if we don't?" *Id.* For too long, without choice, the answer to that question has been: nothing much.

III. THE PRIMARY EFFECT OF THE CLEVELAND PROGRAM IS THE ADVANCEMENT OF CHILDREN'S EDUCATION, NOT THE ADVANCEMENT OF RELIGION

1. a. The Sixth Circuit did not hold that Ohio lacked a "secular legislative purpose," *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), when it enacted the Scholarship Program. Such a holding would have been extraordinary, as this Court consistently has found valid secular purposes supporting programs of aid to religious schools. Even in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), for example, the Court noted that it "need touch only briefly on the requirement of a 'secular legislative purpose,'" and accepted without hesitation "the recitation of [secular] purposes appended to New York's law." *Id.* at 773. Indeed, Respondents appear to have conceded that the Scholarship Program satisfies the "secular legislative purpose" requirement. *See* 234 F.3d at 967 (Ryan, J., dissenting).

Although the Sixth Circuit thus did not rely overtly on *Lemon*'s "secular legislative purpose" prong, the court

proceeded to hold that the Scholarship Program failed *Lemon*'s "primary effect" prong by impugning Ohio's legislative *purpose*. According to the Sixth Circuit, the Program, while facially religion-neutral, is not really neutral, because it was "*designed in a manner calculated to attract religious institutions*." 234 F.3d at 961 (emphasis added).

b. The majority's rationale for transforming the inquiry into the Scholarship Program's "primary *effect*" into an inquiry into subjective motivation is not clear. The majority evidently was disturbed by the percentage of parents who chose to use the Cleveland aid at a religious school, and even declared that "[t]here is no neutral aid when that aid principally flows to religious institutions." *Id.* That broad declaration, however, collides squarely with *Mueller,* which makes clear that the constitutionality of a facially neutral program does not turn on the percentage of parents who choose to use the aid at a religious school. *See* 463 U.S. at 401 (holding that program did not have "primary effect" of advancing religion even though 96% of beneficiaries attended religious schools; "We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."). With *Mueller* foreclosing straightforward reliance on the percentages here, perhaps the majority thought that its subjective approach to the "primary effect" inquiry offered a way around *Mueller*. *See* 234 F.3d at 961 (purporting to distinguish *Mueller* on the ground that "the Ohio scholarship program is designed in a manner calculated to attract religious institutions").

2. Whatever the majority's rationale for questioning Ohio's motives, its holding that the Scholarship Program's "primary effect" is to advance religion is wrong.

a. In its haste to impute an unconstitutional motive to Ohio's legislature based on the high percentage of children attending private schools who chose religious schools, the

Sixth Circuit overlooked a simple and innocuous explanation for that percentage: a very high percentage of private schools in Cleveland were religious schools. *See* Ohio Pet. for Cert. 19-20 (explaining that "Cleveland's longstanding preponderance of religiously-affiliated private schools serving low- and moderate-income students did not arise as a result of any government action, much less the Scholarship Program"); Hoxby, *supra* note 4, at 25 (noting that "[i]n the United States, 85 percent of private school students attend a school with religious affiliation). Because religious schools far outnumbered non-religious private schools in Cleveland, the facts that far more religious schools than non-religious private schools chose to participate and that far more families chose religious schools than non-religious private schools are entirely unsurprising. *Cf. Mitchell v. Helms,* 530 U.S. 793, 810 (2000) (plurality opinion) (noting "the preference for pre-existing recipients that is arguably inherent in any governmental aid program"). Yet the Sixth Circuit treated these facts as evidence of a covert government plot to establish religion behind an "illusory" veil of facial neutrality. *See* 234 F.3d at 959.

There is no basis in law or logic for the Sixth Circuit's inference of an improper legislative motive on the record here. Even if (contrary to *Mueller*[8]) the percentages of

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[8] The Sixth Circuit's by-the-numbers approach conflicts not only with *Mueller,* but also with this Court's more recent decisions. In *Agostini v. Felton,* 521 U.S. 203 (1997), the Court reiterated that it was not "willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid." *Id.* at 229. Because the program at issue was neutral as between religious schools and non-religious private schools, the Court upheld it even though more than 90% of the private schools in the district were religious. *See id.* at 210; *cf. Good News Club v. Milford Central School,* 121 S. Ct. 2093, 2107 (2001) (explaining that where a forum is made available on a religion-neutral basis, "we would not find an Establishment Clause violation simply because only groups presenting a religious viewpoint have opted to take advantage of the forum at a

participants choosing religious schools compared to non-religious private schools could erase a program's facial neutrality, the percentages cannot be meaningfully analyzed in isolation. If most of the private schools in a city are *non-religious,* but most participants choose religious schools, that surprising asymmetry conceivably could counsel examination of whether the State somehow "designed" the program to favor religious schools behind a mask of facial neutrality. But where, as here, most local private schools are religious, the fact that most participants choose religious schools says nothing about whether the program was "designed in a manner calculated to attract religious institutions." 234 F.3d at 961.

b. The court not only focused on the participation percentages in isolation from the background percentages of religious vs. non-religious private schools. The court then compounded that error by restricting its analysis to the participation percentages in only one year of the Scholarship Program's operation and in isolation from its context.

If the Sixth Circuit had considered the Program in its historical context, it would have discovered another simple and innocuous explanation (beyond the high background percentage of religious private schools) for the high percentage of participants choosing religious schools. As the majority itself noted, at an earlier time in the Scholarship Program's operation, "as many as 22% of the students enrolled in the program attended nonreligious schools." 234 F.3d at 949. Although the majority held that the Program was not religion-neutral where 96% of the students attended religious schools, it did not suggest that a percentage of 78%

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particular time"); *Felton v. Secretary,* 739 F.2d 48, 66 (2d Cir. 1984) (Friendly, J.) ("there could be no greater step away from the goal of reasonable certainty than to adopt a rule that the validity of a program should hinge on its precise workings from year to year"), *aff'd sub nom. Aguilar v. Felton,* 473 U.S. 402 (1985), *overruled sub nom. Agostini v. Felton,* 521 U.S. 203 (1997).

would be unconstitutionally high. Yet the majority ignored why the percentage of participants attending religious schools increased from 78% to 96%. The explanation for that increase is plain:

> the creation and expansion of the community school program in the last two years has significantly reduced the percentage of students attending secular schools in the scholarship program by drawing away the two largest scholarship schools. The Hope schools, which have now been re-established as community schools, educated nearly 15% of all scholarship students in past years.[9]

Community schools receive over $4500 in state funding per student, more than twice the $2250 provided by the Scholarship Program. Because Ohio made the community school program more attractive than the Scholarship Program, it created an incentive for non-religious private schools to exit the Scholarship Program and convert into community schools -- an option that, of course, was not open to religious private schools.

The court below acknowledged these facts, *see* 234 F.3d at 959 (describing the "incentive for private nonsectarian schools to participate in the community schools program rather than in the school voucher program"), but drew the precisely wrong inference from them. According to the majority, the high percentage of religious schools that remained in the Scholarship Program demonstrated that Ohio was guilty of a preference in favor of religion. *See id.* at 959-61.

In reality, these facts demonstrate the opposite. Ohio treated non-religious private schools *more favorably* than religious schools, by allowing non-religious private schools

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[9] Jay P. Greene, *The Racial, Economic, and Religious Context of Parental Choice in Cleveland* 4 (Buckeye Institute 1999), *available at* http://www.ksg.harvard.edu/pepg/papers.htm.

to participate in a more generous program while religious schools had no option but to remain in the less generous Scholarship Program. The increase in the percentage of religious schools in the Scholarship Program thus reflects a preference in favor of *non-religion*.[10]

c. The Sixth Circuit was able to blind itself to this reality only by refusing to consider the Scholarship Program in its statutory context. The court dismissed the "other options available to Cleveland parents such as the Community Schools" as "at best irrelevant," and it self-consciously refused to "examine the entire context of Ohio education." 234 F.3d at 958. This refusal was unjustified, for "the endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 782 (1995) (O'Connor, J., joined by Souter and Breyer, JJ., concurring in part and in the judgment).

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[10] In addition, the Sixth Circuit's exclusive focus on the percentages in one year was erroneous for the more general reason that there is every reason to expect that a choice program, if allowed to operate for a sufficient time, will stimulate demand for private schools, make it possible for more non-religious private schools to operate economically, and thus spur the creation of new non-religious private schools. *See, e.g.*, Hoxby, *Introduction* 14, in Hoxby, THE ECONOMIC ANALYSIS OF SCHOOL CHOICE, *supra* note 2 ("Another common misapprehension is that, under a voucher program that allowed religious private schools to accept vouchers, approximately 85 percent of private school enrollment would be in religious schools because that is the current composition of private schools. Such misapprehensions stem from the belief that the supply of schooling is inelastic."); Greene, *supra* note 9, at 12 ("In Milwaukee the number of secular private schools participating in the voucher program more than quadrupled between 1990 and 1999, from 7 to 30. The number of students enrolled in secular private schools in Milwaukee grew more than six-fold during that time, from 337 to approximately 2,100."). To strike down a voucher program based on the percentage of participants choosing religious schools soon after the program's enactment would be to condemn the program for not having had time to work.

To decide whether a "reasonable observer" would believe that "the State itself is endorsing a religious practice or belief," *Mitchell*, 530 U.S. at 843 (O'Connor, J., joined by Breyer, J., concurring in the judgment), a court must examine "the history and context of the community" and the challenged program, *Good News Club*, 121 S. Ct. at 2106. *See also, e.g., Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481, 492 (1986) (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring) (emphasizing that the Court must examine "the nature and consequences of the program viewed as a whole").

The "reasonable, informed observer" whose perception this Court considers, *Pinette*, 515 U.S. at 773 (opinion of O'Connor, J.), knows that the percentage of participants in the Scholarship Program who attend religious schools is very high because Ohio has "draw[n] away the two largest scholarship schools" into a different and more generous program. Greene, *supra* note 9, at 4. Those non-religious private schools, and the parents and children who chose them, have benefited from Ohio's decision to provide extra funding for non-religious private schools that convert into community schools. Compared to the non-religious schools that may *exit* the Scholarship Program, Ohio *disfavors* the religious schools that have no choice but to remain in that Program. No reasonable observer could transform Ohio's decision to provide extra funding to non-religious private schools into "[a] government statement that religion or a particular religious belief is favored or preferred." *Pinette*, 515 U.S. at 773 (quotations omitted).[11]

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[11] Perhaps the most egregious error to flow from the Sixth Circuit's determination to view the Scholarship Program in total isolation is the court's complaint that, under the Scholarship Program, "[s]tudents may not choose to attend community or magnet schools using a voucher." 234 F.3d at 959. Certainly, no reasonable observer could fault Ohio for this state of affairs, as community and magnet schools are *free* and there is no need for anyone to "us[e] a voucher" to attend them.

d. It would be incongruous if a State's subjective motivation in enacting a facially neutral program could justify holding that the program has an unconstitutional "primary *effect*" of advancing religion. The disuse into which *Lemon*'s "secular legislative purpose" prong has fallen suggests a judicial recognition that courts are not well-situated to determine that a legislature was motivated by an impermissible purpose to promote religion when the legislature has stated a valid secular purpose. *See, e.g., Nyquist,* 413 U.S. at 773 ("[W]e need touch only briefly on the requirement of a 'secular legislative purpose.' As the recitation of legislative purposes appended to New York's law indicates, each measure is adequately supported by legitimate, nonsectarian state interests."). Indeed, this Court seemingly has attached special importance to the "primary effect" inquiry precisely because that inquiry avoids second-guessing a legislature's "recitation" of a secular purpose. *See id.* at 774 ("But the propriety of a legislature's purposes may not immunize from further scrutiny a law which . . . has a primary effect that advances religion . . . .").

Even if courts properly may examine a State's subjective motivation as part of the "primary effect" inquiry, nothing in the record here suggests that Ohio harbored any improper pro-religion motive when it enacted the Scholarship Program. As a result, to decide this case this Court need not foreclose the possibility that a court in another case could find that a facially neutral program was designed with a specific intent to promote religion and that the program failed the "primary effect" prong on that account. But such an inference of an improper legislative motive would require the strongest evidence.

The Sixth Circuit committed a serious error when it seized upon a post-hoc disparity between the number of participants attending religious and non-religious private schools to impugn Ohio's legislative motives. At the very least, the respect that the federal courts owe the States

requires taking a State at its word when it asserts a plausible non-religious motive or explanation for such a statistical disparity. *See Mueller,* 463 U.S. at 394-95 (noting this Court's "reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute"). After all, as Judge Ryan pointed out in dissent, the principle that a validly enacted statute is presumed to be constitutional "is not a mere literary figure for rote recitation in all appellate opinions addressing the constitutionality of legislative enactments," 234 F.3d at 967, but rather a recognition of the fact that state legislators, no less than federal judges, are sworn to uphold the Constitution. *See also, e.g., Wallace v. Jaffree,* 472 U.S. 38, 74 (1985) (O'Connor, J., concurring in the judgment) (stating that "the inquiry into the purpose of the legislature . . . should be deferential and limited," and that "a court has no license to psychoanalyze the legislators").[12] The importance of such federal judicial deference is only heightened in a domain such as education where the States traditionally have been sovereign. *See supra* at 4-5; *cf. Good News Club,* 121 S. Ct. at 2113-14 ("Moreover, any doubt on a question such as this should be resolved in a way that minimizes intrusion by the Federal Government into the operation of our public schools.") (quotation omitted).

The impropriety of the Sixth Circuit's condemnation of Ohio's legislative motives is demonstrated powerfully by comparing the record here to the record in *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290 (2000). In *Santa Fe*, the

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[12] *Cf. Mitchell,* 530 U.S. at 863-64 (O'Connor, J., joined by Breyer, J., concurring in the judgment) ("To find that actual diversion will flourish, one must presume bad faith on the part of the religious school officials who report to the JPPSS monitors regarding the use of Chapter 2 aid. I disagree with the plurality and Justice Souter on this point and believe that it is entirely proper to presume that these school officials will act in good faith.").

Court found that the history and context of the "evolution of the current policy from the long-sanctioned office of 'Student Chaplain' to the candidly titled 'Prayer at Football Games' regulation" demonstrated that the District's protestations of facial neutrality were too clever by half. *Id.* at 309. The District's former policies "unquestionably violated the Establishment Clause," *id.* at 315, and the record made clear that the District "intended to preserve the practice of prayer before football games" and viewed its newly-fashioned facially neutral policy "simply as a continuation of the previous policies." *Id.* at 309. Accordingly, the Court held that a reasonable observer "aware of the history and context of the community and forum," *id.* at 317 (quotation omitted), would understand that the District was attempting to promote religion behind a guise of facial neutrality.

The record in this case could not be more different. As explained above, the percentages that so troubled the court below reflect nothing more sinister than the pre-existing preponderance of religious private schools in Cleveland. Moreover, history and context demonstrate that the percentages within the Scholarship Program would be less disparate if only Ohio had refrained from preferring *non-religious* private schools by allowing them to exit the Scholarship Program in favor of the more generous community school program. Far from suggesting that Ohio is an Establishment Clause recidivist akin to the District in *Santa Fe*, the record here contains "not the slightest hint . . . that when the Ohio statute was enacted either the legislators or the governor had any idea that the public school districts adjacent to Cleveland would not participate" in the Scholarship Program. 234 F.3d at 968 (Ryan, J., dissenting). To the contrary, the only reasonable conclusion on this record is that Ohio correctly recognized that Cleveland's low-income children were consigned to a public school system in a state of "total fiscal and administrative collapse," *Reed*, 934 F. Supp. at 1464, and resolved to "spend[ ] [its]

money to give economically disadvantaged children a better chance at success in life by means of a program that is perfectly consistent with the Establishment Clause." *Agostini*, 521 U.S. at 240.

* * * *

Ohio's innovative response to the crisis in public education in Cleveland was a commendable example of our experimental tradition of federalism. The Scholarship Program represents the best hope for thousands of disadvantaged children to obtain an education remotely comparable to the quality education that we are fortunate enough to take for granted. And the Scholarship Program represents the best hope, after many failures, to stimulate improvements in the Cleveland public schools for the benefit of all of Cleveland's children. This Court should reject the Sixth Circuit's unjustified attack on Ohio's legislative motives and should hold that the "primary effect" of the Scholarship Program is the secular effect of improving the education of Cleveland's children.

CONCLUSION

For the foregoing reasons, and those expressed by Petitioners, this Court should reverse the judgment below.

Respectfully submitted,

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